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No. 62

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NORTHERN NATURAL GAS COMPANY, a Corporation,
Appellant,

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF OF APPELLEE

CHARLES C. McCARTER
State Corporation Commission
State Office Building
Topeka, Kansas

HUGH B. COX
HENRY P. SAILER
Union Trust Building
Washington 5, D.C.

Attorneys for Appellee

INDEX

	Page
Statutes, Orders and Rule Involved	1
Questions Presented	3
Statement of the Case	3
Summary of Argument	9
Argument	13
I. The Natural Gas Act Does Not Deprive the States of Authority to Require Ratable Taking by Purchasers of Natural Gas	14
II. The Kansas Orders Do Not Violate the Natural Gas Act as Applied to Appellant because of Appellant's Special Contractual Arrangements	25
Conclusion	36
Appendix A	37

CITATIONS

Cases:

Allen-Bradley Local v. *Wisconsin Employment Relations Board*, 315 U.S. 740	20
Amy v. *Watertown*, 130 U.S. 301	35
Bandini Petroleum Co. v. *Superior Court*, 284 U.S. 8	15
Buck v. *California*, 343 U.S. 99	20
Champlin Refining Co. v. *Corporation Commission*, 286 U.S. 210	15, 16
Cities Service Gas Co. v. *Peerless Oil & Gas Co.*, 340 U.S. 179	9, 15, 16
Colorado Interstate Gas Co. v. *State Corporation Commission*, Case Nos. 41515, 41516, 41555, 41556 (Kansas Supreme Court)	34
Colorado Interstate Gas Co. v. *State Corporation Commission*, Case No. 42185 (Kansas Supreme Court)	34
Deep South Oil Co., 25 F.P.C. 734 (1961)	17
FPC v. *East Ohio Gas Co.*, 338 U.S. 464	15
FPC v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498	9, 15
FPC v. *Sierra Pacific Power Co.*, 350 U.S. 348	31
FPC v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1	18, 25
Hudson County Water Co. v. *McCarter*, 209 U.S. 349	27
Huron Portland Cement Co. v. *Detroit*, 362 U.S. 440	20
Interstate Natural Gas Co. v. *FPC*, 331 U.S. 682	15
Kelly v. *Washington*, 302 U.S. 1	20
Lindsley v. *Natural Carbonic Gas Co.*, 220 U.S. 61	15
Lone Star Gas Gathering Co., F.P.C. Dkt. CP62-179 (October 17, 1962)	24

Page

Mississippi River Fuel Corp. v. FPC, 252 F.2d 619 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 904 31
Natural Gas Pipeline Co. v. Panoma Corp., 349 U.S. 44 22
Northern Natural Gas Co. v. State Corporation Commission, Case Nos. 42175, 42176 and 42230 (Kansas Supreme Court) 34
Northern Natural Gas Co. v. Republic Natural Gas Co., 172 Kan. 450, 241 P.2d 708 (1952) 8
Ohio Oil Co. v. Indiana, 177 U.S. 190 15
Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, 341 U.S. 329 20
Panhandle Eastern Pipe Line Co. v. Public Service Commission, 332 U.S. 507 ..... 15, 18, 20, 25, 33
Patterson v. Standolind Oil & Gas Co., 305 U.S. 376 15
Permian Basin Pipeline Co. v. Railroad Commission of Texas, 302 S.W. 2d 238 (Tex. Civ. App. 1957), *appeal dismissed*, 358 U.S. 37 ..... 21, 26, 27
Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 ..... 9, 15
Soon Hing v. Crowley, 113 U.S. 703 35
Southwestern Kansas Royalty Owners Association v. State Corporation Commission, Case No. 42038 (Kansas Supreme Court) 34
State Corporation Commission of Kansas v. FPC, 206 F.2d 690 (8th Cir. 1953) 32
Stephenson v. Binford, 287 U.S. 251 ..... 12, 35
Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55 15
Transwestern Pipeline Co., 22 F.P.C. 391 (1959) 32
United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 31
Walls v. Midland Carbon Co., 254 U.S. 300 15

Statutes:

Kansas G.S. 1961 Supp., 55-703 ..... 2, 37
G.S. 1949, 55-704 ..... 2, 6, 38
Louisiana Revised Statutes, 1950, Title 30, Secs. 41-46 16
Natural Gas Act, 15 U.S.C., 717, *et seq.* ..... 2, *et seq.*
New Mexico Statutes Annotated, 1941, Ch. 69-214 16
Oklahoma Statutes Annotated, Title 52, Sec. 240 16
Vernon's Texas Statutes Annotated, Title 102, Article 6049a Secs. 8, 8a 16

Miscellaneous:

18 C.F.R. §§ 154.23, 154.101 23
H. R. Rep. No. 709, 75th Cong., 1st Sess. 15
Notice of Proposed Rulemaking, 26 Fed. Reg. 4615 (May 26, 1961) 32

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STATUTES, ORDERS AND RULE INVOLVED

The Order of the State Corporation Commission found valid by the Kansas Supreme Court in Case No. 42,128 provides in pertinent part as follows:

> "IT IS, THEREFORE, BY THE COMMISSION ORDERED: That Northern Natural Gas Company be and it is hereby ordered to take gas ratably from all wells to which it is connected in the Kansas Hugoton Gas Field."

The Order and Rule of the State Corporation Commission found valid by the Kansas Supreme Court in Case No. 42,127 provide in pertinent part:

> "IT IS, THEREFORE, BY THE COMMISSION ORDERED: That Rule 82-2-219 be, and it is hereby, added to the Commission's General Rules and Regulations for the Conservation of Crude Oil and Natural Gas; and this order and Rule 82-2-219 be filed with the Revisor of Statutes on February 8, 1960, and shall also be in full force and effect on February 8, 1960. * * *
>
> RULE 82-2-219
>
> RATABLE PRODUCTION OF GAS FROM COMMON SOURCE OF SUPPLY.
>
> "In each common source of supply under proration by this Commission, each purchaser shall take gas in proportion to the allowables from all the wells to which it is connected and shall maintain all such wells in substantially the same proportionate status as to overproduction or underproduction; provided, however, this rule shall not apply when a difference in proportionate status results from the inability of a well to produce proportionately with other wells connected to the purchaser (Authorized by G.S. 1959 Supp., 55-703; effective February 8, 1960)."

The Kansas statutes upon which the aforesaid Orders and Rule of the State Corporation Commission are based (G.S. 1961 Supp., 55-703 and G.S. 1949, 55-704) are set forth in Appendix A. The relevant sections of the Natural Gas Act (15 U.S.C. 717 *et seq.*) appear in appellant's brief as Appendix G.

QUESTIONS PRESENTED

1. Whether the Natural Gas Act deprives the State of Kansas of the authority to prevent drainage and thus protect the correlative rights of owners of natural gas resources within the State by requiring all purchasers from common sources of supply to take gas ratably from all of the wells to which they are connected?

2. Whether ratable take orders of the State of Kansas are invalid under the Natural Gas Act as applied to appellant, a purchaser of natural gas in Kansas, by reason of appellant's special contractual relationships with particular natural gas producers?

STATEMENT OF THE CASE

This litigation involves the validity of orders issued by the Kansas Corporation Commission in 1959 and 1960, which require each purchaser of natural gas from common sources of supply in Kansas, including appellant, to take ratably from its well connections in those common sources. The orders do not provide that appellant or any other purchaser of gas must take particular volumes of gas, or indeed any gas whatever, from any field or from any producer or group of producers in Kansas. They do not establish or set the price to be paid for any gas. They direct only that a purchaser of gas may not discriminate among its well connections by taking disproportionately low or high volumes of gas from particular wells, thus creating drainage of underground gas across lease lines to the injury and prejudice of the correlative rights of the disfavored producers.

Kansas, like other important oil and gas producing states, has by statute established a regulatory system designed to prevent waste in the production of oil and gas and to protect the correlative rights of the owners of producing properties. The system is administered by the State Corporation Commission. Pursuant to this regulatory plan the State Corporation Commission from time to time sets a production allowable for each gas field on the basis of economic and conservation standards, and each month issues a proration order making an allocation of allowables among the wells in each field on the basis of relevant engineering factors.[1] (R. 58-62). The effect of this action is to set an upper limit on the amount of gas that may be produced from each well. At the time of the promulgation of the orders involved in this case, however, there was no requirement in any regulation of the Kansas Commission that the amount of gas produced or taken from any one well bear any relationship to that produced or taken from any other well in the same field.

Appellant, a "natural gas company" within the meaning of the Natural Gas Act, has for many years taken gas from the wells of numerous producers in the Kansas Hugoton Gas Field. (R. 70, 75-76) For some time prior to the promulgation of the orders at issue in this case, appellant had been taking from some 144 wells of one favored producer in that field, Republic Natural Gas Company (hereafter "Republic"), a percentage of the allowables of those wells far higher than the percentage of the allowables that

[1] The validity of the Kansas allowable and proration orders is in no way involved in this case.

it was taking from the more than 1100 wells of all other producers in the same field with which it was connected.[2] (R. 32-34, 99)

On May 27, 1959, the Kansas Corporation Commission issued an order reciting that it had become apparent that appellant had not been taking ratably from its connections and directing that a hearing should be held to determine whether appellant should be required to take ratably from those connections. (R. 66-67) A hearing was held at which evidence was presented that as a result of appellant's failure to take ratably, drainage across lease lines had occurred and the correlative rights of producers other than Republic were being injured and prejudiced by an escape of gas from their leases to those of Republic.[3] (R. 80-85, 88, 93-94)

On October 7, 1959, the State Corporation Commission, having heard this and other testimony, ordered appellant to take gas ratably from all wells to which its pipeline system is connected in the Kansas Hugoton

[2] For example, in 1959 appellant's takes from the favored wells amounted to 86.19% of their allowables while its takes from its other connections were only 53.61% of allowables. (F.P.C. Memorandum, Appendix D, p. 55, collecting data from Kansas Corporation Commission Monthly Proration Reports)

[3] An expert witness testified: "In comparing that we see that Northern Natural Gas Company, excluding Cities Service Oil Company and Republic "A" connections, had 522.09 (percent underproduction); Republic Natural Gas Company (Group "A"), 4.29; and with the Cities Service Oil Company's connections, 547.36 percent. To have everything ratable here, each one of these figures should be around 425.77 percent underproduced. • • • I have expressed an opinion that there is drainage occurring. Our studies indicate that if the wells are produced with the same percent of allowable production or of net allowable production, then the wells will be ratable, and correlative rights will be protected." (R. 33)

Gas Field. (R. 99-101) Subsequent thereto, and after due notice and hearing, the Commission issued an order and accompanying rule, effective February 8, 1960, directing every purchaser of gas in Kansas, including appellant, to take gas ratably from its connections in each common source of supply under proration by the Commission. (R. 14-18) These actions were taken pursuant to the express direction of the Kansas statute that the Commission "shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of any one common source of supply as against another and in favor of or against any producer in such common source of supply." (G.S. 1961 Supp. 55-703; and see Finding 2 at R. 16)

Appellant sought judicial review in the District Court of Finney County, Kansas. On April 8, 1960, that court affirmed the Orders and Rule of the State Corporation Commission. (R. 26, 112) Thereafter the Kansas Supreme Court affirmed both the lower court's decision upholding the validity of the Commission's order requiring appellant to take gas ratably in the Kansas Hugoton Field (R. 157-175) and the lower court's decision upholding the validity of the Commission's Order and Rule directing all purchasers of natural gas to take gas ratably from each common source of supply under proration in Kansas. (R. 36-41) Appellant's motions for rehearing in the Kansas Supreme Court were denied. (R. 44, 187-189) On May 28, 1962, this Court noted probable jurisdiction.

Because the position taken by appellant as to the validity of the Kansas orders is largely, and that of the Federal Power Commission exclusively, based on the terms and consequences of certain contractual arrangements between appellant and various producers in the Kansas Hugoton Field, it is appropriate here briefly to describe the nature of those contracts, which have been filed with the Federal Power Commission as rate schedules.

On December 21, 1945, appellant as buyer, and Republic as seller, executed a gas purchase contract covering certain gas reserves in the Kansas Hugoton Gas Field. (R. 70-73, 115-156) The 1945 contract was amended by the parties on June 30, 1953. (R. 70) The basic contract of December 21, 1945, as amended in 1953, will hereafter be referred to as the "Republic A contract" and the wells covered by the contract as the "Republic A wells". That contract contains a so-called "take or pay" provision requiring in substance that appellant is to take from the Republic A wells that volume of gas necessary to supply 60% of the requirements of appellant's Omaha district, or pay for that volume of gas even if not taken. (R. 115-120, esp. Section 5 at R. 120) The contract also contains a provision which expressly subjects the rights of the parties to all present and future valid orders, rules and regulations of any regulatory body of the state or federal government. (Section 2 at R. 136)

At various times from 1938 to the present appellant has also entered into gas purchase contracts for additional supplies of gas in the Kansas Hugoton Field with various other producers. (R. 75, 76-78) All of these contracts with producers other than Republic

provide for ratable taking as among those producers, but not as between those producers and Republic.[4]

By 1947 the quantity of gas provided for by the take or pay provisions in the Republic A contract had come to exceed the allowables assigned by the Kansas Corporation Commission to the Republic A wells. (R. 74) This situation led to litigation, and in *Northern Natural Gas Co.* v. *Republic Natural Gas Co.*, 172 Kan. 450, 241 P.2d 708, 720 (1952), the Supreme Court of Kansas ruled that the Republic A contract was necessarily subject to allowable orders issued by the State Corporation Commission. Accordingly, the court held that appellant was contractually obligated to take from the Republic A wells only the amount of the allowables assigned to those wells even if that amount was smaller than the amount of gas specified in the contract, and that appellant incurred no liability under the take or pay provisions for failing to take gas in excess of the allowables.

Although appellant was thus relieved by operation of Kansas law from part of its contract obligation to Republic, it nevertheless thereafter began to take from its other connections in the Kansas Hugoton Field a far smaller percentage of their allowables than it took from its Republic A connections. This situation resulted in the promulgation by the Kansas Corporation Commission of the orders involved in this case.

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[4] See, for example, the ratable take provisions in appellant's contract with Cities Service Oil Company, which are typical of those in all of the contracts under which appellant buys gas in the Kansas Hugoton Field other than the Republic A contract. (R. 76, 77-78)

SUMMARY OF ARGUMENT

I

The Kansas orders are an exercise of state power that protects the correlative rights of landowners and producers by requiring ratable taking. They do not fix or otherwise establish prices, or require natural gas companies to purchase any particular amount of natural gas. The Natural Gas Act does not deprive the states of the power to order ratable taking. At the time of the passage of the Natural Gas Act the states possessed the authority to require ratable taking to prevent the impairment of correlative rights. See *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 185. It is well settled that when Congress enacted the Natural Gas Act it did not intend to deprive the states of this or any other power in the field of natural gas regulation that they were then deemed to possess under the Constitution. See, *e.g.*, *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 684, 685-687; *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 502-503, 512-513.

The fact that the orders read upon purchasers rather than producers does not make the orders invalid under the Natural Gas Act. That is a matter of form that should not be allowed to obscure the real character of the orders. Since the production of natural gas (its withdrawal from the ground) and its taking for interstate commerce are a single transaction, an order for ratable taking is in substance a regulation of production. The orders are addressed to the takers of natural gas because that is the most feasible method of assuring ratable production and protecting correlative rights, and because the contracts of appellant and other purchasers of gas in the Kansas Hugoton Field in effect

give them the power to control production. And in any event, the label applied to the orders is immaterial because no matter how described they do not invade any area reserved exclusively to Federal authority. It is not true that any state regulation that impinges in any way upon interstate sales of natural gas is invalid under the Supremacy Clause. The question is, rather, whether the exercise of the state power in question is actually inconsistent or in conflict with particular authority of the Federal Power Commission. A particularized consideration of the provisions of the Natural Gas Act cited by appellant demonstrates that appellant's claims of conflict are not well founded. The two Kansas orders do not conflict with or impair the authority of the Federal Power Commission to fix prices for gas sold in interstate commerce for resale, to control the terms and conditions of such sales, to grant certificates of convenience and necessity for the interstate transportation or sale of natural gas, or to exercise any of the other powers conferred upon the Commission by the Natural Gas Act.

The Federal Power Commission has recognized that the Natural Gas Act does not give it the power to protect correlative rights by ordering ratable taking. Accordingly, a holding that the Natural Gas Act precludes the states from protecting correlative rights by requiring the ratable taking of gas by purchasers in interstate commerce would create a regulatory gap, contrary to the teachings of this Court.

II

The remaining question is whether even if the Kansas orders are the kind of state regulatory action that would ordinarily be valid, they are invalid as applied

to appellant in this case because of the special contractual relations that exist between appellant and various producers of natural gas in the Kansas Hugoton Gas Field and elsewhere. Appellant and the Federal Power Commission both contend that because of the "take or pay" or "minimum take" provisions of many of these contracts, obligating appellant to pay for a certain minimum quantity of gas whether or not it takes that quantity, appellant can comply with the Kansas orders only by taking and paying for more gas than it wants or by incurring contractual liability to various of its suppliers. It is urged that this will result in an increase in the price of gas to the ultimate consumer and that for this reason the orders are inconsistent with the Natural Gas Act.

The orders are valid even on the assumption that compliance with them may, because of appellant's contracts, require appellant to pay for gas that it does not take. The argument to the contrary inverts the accepted legal principle that regulatory action controls private contracts by asserting that here it is the private contracts that control regulatory action. It cannot be seriously urged that the validity of state regulation is to be measured simply by whether it may affect the cost of gas to the ultimate consumer. Any state conservation measure may have this effect yet it cannot be argued that such measures are invalid under the Natural Gas Act. The test of the validity of state natural gas regulation is whether it interferes with particular regulatory powers granted to the Federal Power Commission. In this case the Federal Power Commission retains plenary authority to prevent, if it sees fit, the very consequences that are said to invalidate the Kansas orders. The Commission

could, if the public interest were deemed so to require, prevent appellant from passing on to its customers any increased cost incurred as a result of its special contractual provisions. The Commission also asserts authority to modify or cancel take or pay provisions in proceedings under Section 5 of the Natural Gas Act, and to deal with such provisions in Section 4 or Section 7 proceedings. These powers are not impaired by the Kansas orders and there is thus no need to invalidate the orders, and disregard the legitimate state interests which they serve, in order to vindicate any Federal interest that may exist in the premises.

There is no merit in the argument of appellant and the Power Commission that the orders are invalid because the "motive" of the Kansas Commission in issuing them was "to exert leverage on interstate pipe line companies to increase their takes from Kansas wells". First, the question of motive is irrelevant if the state, as here, is exercising power that is otherwise within its competence. See, *e.g.*, *Stephenson* v. *Binford*, 287 U.S. 251, 276. Second, the authority claimed by the Federal Power Commission is, as shown above, ample to prevent any consequences that the state orders might otherwise have in exerting the alleged "leverage". Finally, the argument is based upon inferences essentially derived not from the orders here at issue, or from the record in this case, but rather from entirely separate proceedings and orders relating to the setting of field allowables, whose validity is now before the Kansas Supreme Court and which this Court should not undertake to pass upon at this time.

ARGUMENT

The Kansas orders whose validity is at issue in this case simply provide that every purchaser of gas in a common source of supply in the State of Kansas is to take gas ratably from the wells to which it is connected in that common source of supply. They do not discriminate between purchasers of gas for resale in interstate commerce and other purchasers. They do not direct or require any purchaser to take any particular volume of gas—or indeed any gas—from Kansas producers as a group or from any particular Kansas producer. They do not fix or establish the price to be paid for any gas. In short, they amount to nothing more than an exercise of the State's power to protect correlative rights by requiring ratable taking and do not unlawfully impinge upon any regulatory area forbidden to the states by the Natural Gas Act or the Commerce Clause.

The Kansas orders are attacked on two grounds: First, appellant argues that because the orders read on purchasers rather than producers they are *ipso facto* a regulation of sales in interstate commerce for resale and hence are invalid under the Natural Gas Act because that statute gives the Federal Power Commission "exclusive jurisdiction" to regulate such sales. In the second place both appellant and the Federal Power Commission argue that even if the Natural Gas Act does not under ordinary circumstances deprive a state of the power to order ratable taking of natural gas there are in the instant case special circumstances that make the Kansas orders invalid as applied to appellant. These special circumstances are said to arise because appellant has by contract with a particular favored producer in the Kansas Hugoton Field under-

taken to take, or to pay for even if not taken, a certain quantity of natural gas from its connections with that producer. It is argued that because of this private contractual arrangement, the effect of the Kansas orders will be to force appellant either to increase its total purchases of gas in the Kansas Hugoton Field and decrease its purchases in other states, thereby incurring contract penalties to producers in those other states, or to reallocate its purchases in the Kansas Hugoton Field, thereby incurring contract penalties to Republic. It is asserted that either of these results will increase the cost of natural gas to the consumer and accordingly conflict with the Natural Gas Act.

There is no merit in either of these arguments.

I

The Natural Gas Act Does Not Deprive the States of Authority to Require Ratable Taking by Purchasers of Natural Gas

Appellant's first argument—that a state ratable take order necessarily invades an area forbidden to the states under the Natural Gas Act if it reads on purchasers of natural gas in interstate commerce for resale—ignores a long course of history. It is well settled that when Congress enacted the Natural Gas Act in 1938 it did not intend to deprive the states of the powers in the field of natural gas regulation which they were then deemed to possess under the Constitution. Rather, the Natural Gas Act was intended only to fill the "gap * * * thought to exist at the time the Natural Gas Act was passed" by providing for Federal regulation of those aspects of the natural gas business which the states were at that time believed to be con-

stitutionally incapable of regulating. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 684, 685-687. As was specifically stated in the House Committee Report on the bill (H.R. Rep. No. 709, 75th Cong. 1st Sess., p. 2) "The bill takes no authority from state commissions, and is so drawn as to complement and in no manner usurp state regulatory authority * * *." See also *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 517 ("The Act, though extending federal regulation, had no purpose or effect to cut down state power"); *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464; *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 502-503, 512-513; *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682, 690.

At the time of the passage of the Natural Gas Act, it had long been firmly established that the authority of the states to insure by appropriate regulation the prevention of drainage and waste and the impairment of correlative rights of owners of natural gas resources could be exercised consistent with the Federal Constitution. *Patterson* v. *Stanolind Oil & Gas Co.*, 305 U.S. 376; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 76-77; *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, 22; *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210; *Walls* v. *Midland Carbon Co.*, 254 U.S. 300, 323; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61; *Ohio Oil Co.* v. *Indiana*, 177 U.S. 190. And this Court has specifically held that this established authority included the right to require ratable taking. In *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 185, the Court said:

> "This Court has upheld numerous kinds of state legislation designed to curb waste of natural resources and to protect the correlative rights of owners through ratable taking. *Champlin Refining*

Co. v. *Corporation Commission*, 286 U.S. 210 (1932) * * *."[5]

Because prior to the passage of the Natural Gas Act the states were recognized to have the authority to require ratable taking by purchasers of gas from common sources of supply, and because that Act did not deprive the states of this preexisting authority, there is no basis for appellant's argument that a ratable take order that reads on interstate purchasers of natural gas must be inconsistent with the Natural Gas Act. Indeed, precisely the opposite result follows from the authorities and principles discussed above.[6]

Appellant argues, however, that because the Kansas orders read on purchasers rather than producers of natural gas, they constitute a regulation of interstate sales of natural gas rather than of production and for that reason necessarily invade the authority reserved to the Federal Power Commission under the Natural Gas Act, urging that this Court has held that the Commission has exclusive and plenary jurisdiction over sales of natural gas in interstate commerce for resale.

The fact that in form the Kansas ratable take orders are addressed to purchasers and not to producers should not be allowed to obscure their real character. The production of natural gas (its withdrawal from

[5] Although the *Peerless* case was decided in 1950, the quoted passage refers to the constitutional powers of the states before the passage of the Natural Gas Act, as is shown by the Court's citation of the *Champlin* case which was decided six years prior to the passage of the Act.

[6] Most of the more important oil and gas producing states have long had statutes that provide for ratable taking to protect correlative rights. See, *e.g.*, Vernon's Texas Statutes Annotated, Title 102, Art. 6049a, Secs. 8, 8a (enacted in 1931); Oklahoma Statutes Annotated, Title 52, Sec. 240 (enacted in 1913); Louisiana Revised Statutes, 1950, Title 30, Secs. 41-46 (enacted in 1918). See also New Mexico Statutes Annotated, 1941, Ch. 69-214.

the well) and its movement into interstate commerce are a single physical operation. An order requiring ratable taking is therefore in every real sense tantamount to a regulation of the production of the wells involved.[7] That this is so is in effect admitted by the Federal Power Commission (F.P.C. Memorandum, p. 25) and the Commission has elsewhere recognized that state ratable take orders are in substance a regulation of production, and are not inconsistent with the Natural Gas Act. See *Deep South Oil Co.*, 25 F.P.C. 734, 737 (1961).[8]

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[7] An order directed to the taker of natural gas rather than to the producer is the most feasible regulatory method of providing for ratable taking. It is the taker and not the various producers who is in a position to know whether his takes from each of his connections in the field are such that the production of the wells is ratable. An order addressed simply to producers which required each producer to produce ratably with others with whose activities he was unfamiliar and over whose activities he had no control would create difficult and probably insoluble administrative problems.

It should also be observed that because appellant's contracts with its suppliers in the Kansas Hugoton Field give appellant the power to control production, appellant is in effect equivalent to a producer. Thus appellant's contract with Republic states that: "Northern shall have the right to regulate the rate of flow of gas from each well to the extent necessary to enable it to purchase the aggregate volumes of gas herein agreed to be purchased." (R. 151)

[8] Appellant urges that the exercise of state power here involved is invalid because the "production or gathering" exemption of Section 1(b) of the Natural Gas Act (15 U.S.C. § 717(b)) does not apply to sales of natural gas in interstate commerce for resale. As we have shown, however, the Natural Gas Act does not deprive Kansas of the power to regulate the taking of natural gas to prevent drainage and thus protect correlative rights, because that is a power that the State could constitutionally have exercised under the decisions of this Court prior to the passage of the statute. Whether this power be deemed to be explicitly preserved by the "production or gathering" exemption of Section 1(b) or whether it survives because it has not been overridden by any grant of Federal regulatory power is of no moment.

In any case, the label applied to the orders is immaterial. Whether they are described as a regulation of production or as a regulation of purchases, the orders do not invade the areas reserved to exclusive Federal authority. Appellant argues that the Federal Power Commission has exclusive and comprehensive power to regulate every aspect of sales of gas in interstate commerce, and that accordingly any state regulation that impinges in any way upon interstate sales is invalid under the Supremacy Clause. This assumption is incorrect. As this Court has noted in *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 8:

> "* * * Congress, in enacting the Natural Gas Act, did not give the Commisson comprehensive powers over every incident of gas production, transportation and sale. Rather, Congress was 'meticulous' only to invest the Commission with authority over certain aspects of this field, leaving the residue for state regulation. *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U.S. 507."[9]

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[9] The Court's citation of the *Panhandle* case in the quoted passage is particularly significant because appellant several times refers to a portion of the *Panhandle* opinion that speaks of the intention of Congress "to create a comprehensive and effective regulatory scheme." (Appellant's Brief, pp. 15, 18, 25) Any apparent inconsistency between these words and this Court's citation of the *Panhandle* case in *Transcontinental* disappears when one examines the entire passage in *Panhandle* from which those words have been extracted (332 U.S. at 520):

> "The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level. We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority."

The status of an exercise of state power over natural gas is therefore not to be determined on the basis of any general assumption that the powers of the Federal Power Commission are comprehensive and exclusive but instead by a careful consideration of the nature of the state power exercised (*i.e.*, whether it was possessed by the states prior to passage of the Natural Gas Act) and of the question whether the exercise of the state power is actually inconsistent or in conflict with the power of the Federal Power Commission. The Kansas orders satisfy these tests. As we have shown above, a ratable take order is an exercise of constitutional power that was possessed by the states prior to the passage of the Natural Gas Act. And as we shall now show, the Kansas orders are not inconsistent or in conflict with the regulatory powers of the Federal Power Commission.

An exercise of state power does not conflict with the Natural Gas Act merely because it impinges upon or affects sales of gas in interstate commerce. For example, a state proration order may directly and substantially reduce the amount of gas available for delivery under a contract of interstate sale; yet it cannot reasonably be argued that for that reason such a state order is invalid under the Natural Gas Act.[10] This Court has recognized that under the Natural Gas Act

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[10] Indeed appellant in a document filed with the Federal Power Commission in another proceeding, which is set forth in Appendix G to the Memorandum of the Federal Power Commission (pp. 61, 67), points out that its obligation to purchase gas under contracts that have been filed with the Federal Power Commission "in many instances has been altered by the proration of production by state regulatory agencies, whereby the volume of gas to be purchased is determined by standards other than as written in the contract."

the states retain power to regulate matters of local concern even though in doing so they may to some degree affect or touch upon subject matter regulated by the Federal Power Commission. Thus, this Court has held that a state may validly require a natural gas company to obtain a certificate of public convenience and necessity before making direct sales of natural gas to industrial consumers even though the facilities used in making the sales are also subject to certification by the Federal Power Commission. *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329. See also *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507. The principle of these cases is merely an application of the general rule that state regulation of matters of local concern is not invalid under the Supremacy Clause merely because it relates to subject matter which is also subject to regulation under a federal statue. See *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440; *Buck* v. *California*, 343 U.S. 99, 101-102.

Appellant's claims of inconsistency and conflict between the Natural Gas Act and ratable take orders reading on natural gas purchasers are therefore not to be evaluated on the basis of mere generalizations, but rather in light of a particularized consideration of the provisions of the statute.[11] On this basis, it becomes evident that appellant's arguments are not well founded. Appellant refers specifically to Sections 1, 4, 5, 7 and

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[11] See *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U.S. 740, 744: "* * * this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested.'" See also *Kelly* v. *Washington*, 302 U.S. 1, 10.

16 of the statute. None of these sections advances appellant's position.[12]

Section 1, for example, provides, so far as is here relevant, that "The provisions of this act shall apply * * * to the sale in interstate commerce of natural gas for resale * * *." The section does not specify the nature or the extent of the authority of the Federal Power Commission over such sales. The scope of that authority, and the degree to which the states are precluded from exercising authority which may affect particular aspects of such sales, must necessarily be determined by reference to other provisions of the Act. The same is true of Section 16, which merely confers authority upon the Commission to make rules and regulations as to matters falling within its regulatory power. That provision does not in any way indicate the extent or nature of the Commission's regulatory power. Accordingly, it is clear that neither of these sec-

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[12] The same broad attack upon the validity of a state ratable take order that is made by appellant here was made by a natural gas company and rejected by this Court in *Permian Basin Pipeline Co.* v. *Railroad Commission of Texas*, 302 S.W.2d 238 (Tex. Civ. App. 1957), *appeal dismissed*, 358 U.S. 37. That case involved the validity of a ratable take order issued by the Texas Railroad Commission in the Puckett-Ellenburger Gas Field. Permian's purchases of natural gas in the field were made under contracts on file with the Federal Power Commission and the prices established in the contracts were subject to Federal regulation. Permian contended, *inter alia*, that the Texas order conflicted with the Natural Gas Act and was therefore invalid. This argument was rejected by the Texas court and Permian appealed to this Court. The Texas Railroad Commission filed a motion to dismiss for want of a substantial Federal question and the motion was granted.

tions produces the conflict or inconsistency urged by appellant.[13]

Nor is such inconsistency or conflict found in relation to the authority over prices conferred upon the Commission by Sections 4 and 5 of the Natural Gas Act. The Kansas orders do not fix or establish rates, and accordingly cases cited by appellant such as *Natural Gas Pipeline Co. v. Panoma Corp.*, 349 U.S. 44, holding that the Commission has exclusive jurisdiction to regulate the price of gas sold in interstate commerce for resale, are not in point.[14] There is likewise no merit in appellant's contention that the orders conflict with the authority of the Commission under the provisions mentioned because they direct appellant to take gas "in a manner or at a rate" contrary to the provisions of contracts that have been filed with the Power Commission as price schedules.[15] (Appellant's Brief, p. 19)

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[13] In support of its contention that the Kansas orders are inconsistent and in conflict with the Natural Gas Act, appellant cites a number of regulations issued by the Federal Power Commission under Section 16. Since the regulations cannot expand the statutory authority of the Commission the question of conflict between the Act and the Kansas orders must be resolved by reference to the substantive provisions of the statute. A review of the regulations cited by appellant shows that in fact they do not relate in any way to the ratable taking of gas, and that there is no conflict between the regulations and the Kansas orders.

[14] Appellant and the Federal Power Commission do not argue that the Kansas orders fix or establish rates; they do contend that because of private contractual arrangements that appellant has made with one supplier the effect of the orders will be to increase costs and that in time the increase in costs will be necessarily reflected in higher rates. This point is dealt with at pages 26-33, *infra*.

[15] Presumably appellant uses the word "rate" to denote the volume of gas taken since the Kansas orders do not fix or otherwise establish the price to be paid for any gas.

The fact that contracts have been accepted by the Commission for filing does not, as the Commission's own regulations show, mean that the Commission has approved all, or indeed any, of the terms and conditions contained therein. 18 C.F.R. §§ 154.23, 154.101.

Furthermore, appellant's contention that the Kansas orders direct it to take gas in a manner or at a rate different from those set out in its contracts is itself without substance. Nothing in any of those contracts purports to forbid appellant to take ratably from all of its connections in the Kansas Hugoton Field. Indeed, appellant itself states in its brief that from 1944 to 1958, a period during which it was purchasing under contracts with the same terms as those that it now claims to be inconsistent with ratable taking, its purchases from its connections in the Kansas Hugoton Field, were "substantially ratable." (Appellant's Brief, p. 10)

Finally, even were it to be assumed that the Federal Power Commission had affirmed or approved all the terms and conditions in appellant's contracts, and that the Kansas orders in fact do require appellant to take gas in a manner and at a rate different from those provided in the contracts, there would still be no conflict between the orders and the authority of the Federal Power Commission. Each of the contracts referred to contains a provision expressly making it subject to "all valid present and future orders, rules and regulations of duly constituted authorities having jurisdiction." (*e.g.*, R. 136) Accordingly, no state order can be held invalid simply on the ground that it "conflicts" with the terms and conditions of the contracts, because so long as the state order is not

invalid for some other, independent reason the contracts themselves provide for a resolution of any such conflict in favor of the order.

Appellant likewise makes no showing that the Kansas orders are inconsistent or in conflict with any authority conferred on the Federal Power Commission by Section 7 of the statute, dealing with the issuance of certificates of convenience and necessity. The Kansas ratable take orders do not direct the taking by appellant of any gas in a manner inconsistent with any obligation assumed by or imposed upon appellant by any certificate. Appellant points to no provision of any certificate that suggests the contrary, and here again it is surely significant that appellant claims that for a number of years prior to the promulgation of the orders it took from its connections in accordance with the ratable taking principle now set forth in the orders.

There is an additional reason why this Court should not hold that the Natural Gas Act precludes the states from protecting correlative rights by directing the ratable taking of gas by purchasers in interstate commerce. If states do not have this authority, then no regulatory agency does. The Natural Gas Act does not give the Federal Power Commission power to protect correlative rights by ordering ratable taking. That power is not expressly conferred on the Commission by any provision of the statute and it cannot be reasonably implied from any of the powers that are expressly conferred. The Commission itself has explicitly recognized that it has no such authority. *Lone Star Gas Gathering Co.*, F.P.C. Dkt. CP62-179 (Oc-

tober 17, 1962).[16] A decision that the Act deprives the states of authority to order ratable taking by purchasers for resale in interstate commerce would therefore create a gap in regulatory authority, a result contrary both to the expressed intent of Congress and to decisions of this Court. See *FPC* v. *Transcontinental Gas Corp.*, 365 U.S. 1, 19, 28; *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507.

II

The Kansas Orders Do Not Violate the Natural Gas Act as Applied to Appellant Because of Appellant's Special Contractual Arrangements

The remaining question is whether the Kansas orders, although the kind of state regulatory action that would be valid in ordinary circumstances, are invalid as applied to appellant in this case because of the special contractual arrangements that exist between appellant and its various suppliers in the Kansas Hugoton Field and elsewhere.[17] With respect to this as-

[16] The Commission in denying a motion for leave to intervene said:

> "Petitioner alleges that • • • in the event a certificate is granted to Lone Star, the reserves dedicated to Petitioner are in danger of being drained by Lone Star. • • •
>
> "The matters upon which Petitioner desires to be heard in this proceeding relate to the ratable production of natural gas, the correlative rights of producers and proration of production among producers producing natural gas from common reservoirs. We are of the opinion that these are matters which lie within the sphere of state control and cannot constitute a basis for intervention in the proceedings before the Commission."

[17] Appellant in this connection refers only to its contracts with producers in the Kansas Hugoton Field (Appellant's Brief, p. 28). The Federal Power Commission points also to appellant's purchase contracts in other states. (F.P.C. Memorandum, pp. 26-27)

pect of the case the contentions of appellant and the Federal Power Commission may be stated in essence as follows:

Appellant's Republic A contract, and its contracts with producers of gas in states other than Kansas, contain "take or pay" or "minimum take" provisions that obligate appellant to pay for a certain minimum quantity of gas at the contract price even if it takes less than that amount. To comply with the Kansas orders by taking ratably in the Kansas Hugoton Field, appellant, it is argued, would have to do one of two things: (1) increase its takes from its other connections in the field until they became ratable with its takes from the Republic A wells, or (2) continue to take the same amount from the field as a whole but reallocate its takes so as to make them ratable by decreasing takes from Republic to a figure below the amount provided by the contract and increasing takes from other wells. It is contended that the first of these courses would require appellant either to take from the Kansas Hugoton Field gas which it does not want and for which it has no present market or to reduce its takes in other fields and thereby incur contractual liability to producers in those fields, and that the second would result in contractual liability to Republic. Either course, it is argued, will necessarily cause an increase in the price of gas to the ultimate consumer, and for this reason the Kansas orders are inconsistent with the Natural Gas Act.[18]

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[18] Substantially the same arguments with respect to the effect of contractual arrangements on the validity of a state ratable take order were made in *Permian Basin Pipeline Co.* v. *Railroad Commission of Texas*, 302 S.W.2d 238 (Tex. Civ. App. 1957), *appeal dismissed*, 358 U.S. 37. There Permian contended that it had take

We submit that the Kansas orders are valid even if it is assumed that compliance with the orders may require appellant to pay for gas not taken. It is familiar law that otherwise valid regulatory measures cannot be defeated by private contractual arrangements. See *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 357. No one would suggest that appellant could resist a state ratable take order simply on the ground that it had by private contract agreed to give preference to a favorite supplier. Yet, in effect, that is the result of the argument now advanced by appellant and the Federal Power Commission. The argument does not suggest that the effect of the contracts is to change the nature of the state power exercised; that power remains, irrespective of the contracts or their consequences, a power to protect correlative rights by requiring ratable taking. The argument simply asserts that even though the State possesses the power to protect correlative rights by requiring ratable taking, that power cannot be exercised as against appellant because of consequences that it is alleged will follow from appellant's private contract obligations. This is an argument that inverts the accepted legal principle that regulatory action controls private contracts by asserting that it is the private contracts that control regulatory action.

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or pay arrangements with one producer and that the effect of the Texas order would necessarily be to force it either to take less from the favored producer than required by contract, thereby subjecting it to potential liability to that producer, or to increase its purchases from other producers in the field to a level greater than its needs. See Jurisdictional Statement, No. 64, October Term 1958. This Court did not regard those arguments as raising any substantial Federal question.

In the instant case acceptance of the argument would produce bizarre results. Presumably the Kansas orders would be valid as applied to all natural gas companies in the Kansas Hugoton Field which do not have contracts discriminatorily favoring some of their connections as against others in the matter of ratable taking.[19] And presumably they would become valid even as to appellant if it should hereafter negotiate a contract with Republic containing no take or pay provision, or negotiate contracts with its other suppliers in the Kansas Hugoton Field that contain such provisions on a basis comparable to the Republic A contract.[20] The application of the Supremacy Clause to state regulation should not be permitted to turn upon such fortuitous circumstances.

In arguing that the alleged consequences of the application of the Kansas orders to appellant's private contracts are inconsistent with the Natural Gas Act, appellant and the Federal Power Commission do not handicap themselves by reference to any specific conflict between the orders and particular Federal regulatory powers. Instead appellant and the Power Commission simply assert that the consequences that they allege will follow from appellant's private contractual arrangements—a forced taking by appellant of increased quantities of gas from a state or the payment by it of contractual penalties—are inconsistent with the

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[19] The consequences complained of by appellant and the Federal Power Commission in this litigation arise, it should be noted, not simply because appellant's contract with Republic contains take or pay provisions, but only because that fact is coupled with the additional fact that appellant's other contracts in the field do not contain similar provisions on a comparable basis.

[20] Conversely, presumably other purchasers could render the orders invalid as to them simply by entering into contracts favoring one particular producer at the expense of other producers.

Natural Gas Act because they will lead to an increase in the cost of natural gas to consumers. The premise of this argument appears to be that the validity of state regulation under the Natural Gas Act is to be measured simply and solely by whether it may result in an increase in the cost of gas to the ultimate consumer and that this is so even if the power exercised by the state is one that the states possessed prior to the passage of the statute and even if there is no showing that the exercise of the power interferes with any specific authority conferred upon the Federal Power Commission. Nothing in the legislative history of the Federal Power Act, in its provisions, or in the decisions of this Court delineating the boundaries between state and Federal power under the statute provides any support for this premise. It is evident that any state conservation measure limiting the output of gas or regulating the spacing of wells may tend to affect the ultimate cost of gas, but it has never previously been suggested that such measures are for that reason invalid under the Natural Gas Act.[21] The premise of the argument advanced by appellant and the Power Commission, if accepted, would impair, if not destroy, the dual and complementary plan of regulation that the Natural Gas Act was intended to establish.

The argument of the Federal Power Commission and appellant is defective for still another reason. It assumes that if appellant incurs increased costs as a result of being required to take ratably in the Kansas Hugoton Field those costs must necessarily be passed on to consumers. This suggestion overlooks the fact

[21] We do not suggest that such measures invariably increase the cost of gas to the ultimate consumer. In the long run the effect of the measures may well be to decrease the cost of gas. The point is that the validity of these state measures does not turn upon whether they have any effect on the ultimate cost of gas.

that the Federal Power Commission concededly has broad rate-making powers which can be utilized for the purpose of protecting consumers. In the instant case there is no reason why the Commission could not require appellant itself to bear any additional cost incurred because of a contract provision which, although perhaps improvident, was voluntarily accepted by it.[22] It is clearly within the power of the Commission to determine that it is not in the public interest to permit appellant to pass on this cost

[22] It should be noted that the Federal Power Commission's statements to the effect that appellant will incur increased costs by virtue of the Kansas orders, and its calculations as to the amount of these costs, themselves suffer from basic infirmities. In the first place, those statements and calculations are not based upon any material of record in this case but rather on statistics contained in a tabulation filed by appellant with the Federal Power Commission in an unrelated proceeding. (F.P.C. Memorandum, p. 63) Furthermore, contrary to the Federal Power Commission's assertion that these statistics measure appellant's contractual obligations to take gas (F.P.C. Memorandum, p. 27), in fact the statistics provide no basis for any determination as to the extent of appellant's contractual obligations. Appellant itself in explanatory notes to the tabulation makes it plain that the volumes of gas stated are not necessarily volumes that appellant is required by contract to take or to pay for but instead states that "in Northern's judgment, the volumes of gas listed in this volume are *within practical and reasonable limits of prudent operations* or for reasons beyond the control of Northern, the minimum volumes required to be purchased during the calendar year 1960." (F.P.C. Memorandum, p. 67) (Emphasis added.) And even if the statistics relied upon did purport to reflect appellant's contractual obligations, they would not be informative because they fail to disclose instances where any contractual obligation on appellant's part to take a particular minimum quantity of gas is qualified by the common form of "makeup" provision which gives the purchaser of gas a grace period to take gas previously paid for but not taken. To the extent that appellant is in a position to take advantage of provisions of this kind, it need not pay for gas not taken and thus will incur no additional expense by reason of any take or pay obligation.

to its customers. Compare *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355.[23]

Furthermore, it may be noted that the Commission has claimed the authority to deal with a take or pay provision in a proceeding under Section 5 of the Act. See *Mississippi River Fuel Corp. v. FPC*, 252 F.2d 619, 626 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 904. If this claim of authority is to be regarded as valid the modification or elimination of the take or pay provisions in appellant's contracts could be required by the Commission in a Section 5 proceeding, assuming of course that the record before the Commission in that proceeding justified a finding that the change was in the public interest.[24]

[23] Even if it should be assumed that any additional expense incurred by appellant as a result of the take or pay provisions is a legitimate cost of service, and that the Federal Power Commission's assertions as to the amount of that additional expense are accurate (but see note 22, *supra*), it would by no means follow that an expense in that amount would be borne by ultimate consumers. The Federal Power Commission, in discussing the additional expense that appellant would incur if it had complied with the Kansas orders in the year 1970 by increasing its takes from its other connections in the Kansas Hugoton Field and decreasing its take from Republic, asserts: "This increase in cost to Northern, and ultimately to Northern's consumers, would have been $750,259.00." (FPC Memorandum, pp. 29-30). The impression created by such statements is misleading. The rate-making process is not so merely mathematically an exercise that every increase in costs that are properly entitled to consideration in determination of a fair return is automatically reflected by an allowance by the Commission of an increased rate. Except in the context of a particular rate proceeding, any assertion about the effect that an increase in one item of cost will have on the Commission's determination of a reasonable rate of return and on the prices that the Commission will ultimately find to be just and reasonable is wholly speculative and problematical.

[24] Compare *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 344-345, where the Court pointed out that: "• • • the contracts remain fully subject to the paramount power of the

Nor is the Commission's claim of authority over such provisions restricted to Section 5 proceedings. The Commission has also claimed the power under Section 4 to require the modification or removal of such a provision if it is sought to be introduced into a pre-existing contract. See *State Corporation Commission of Kansas v. FPC*, 206 F. 2d 690, 717 (8th Cir. 1953). And in the case of any new operation or service the Commission, under Section 7, has taken the position that it has the authority to require the removal or modification of a take or pay provision in a proposed contract as a condition to the granting of a certificate of convenience and necessity. *Transwestern Pipeline Co.*, 22 F.P.C. 391, 395 (1959); see also Notice of Proposed Rulemaking, 26 Fed. Reg. 4615 (May 26, 1961).[25]

Commission to modify them when necessary in the public interest. • • • Thus, while natural gas companies are understandably not given the same explicit standing to complain of their own contracts as are those who represent the public interest or those who might be discriminated against, there is nothing to prevent them from furnishing the Commission any relevant information and requesting it to initiate an investigation on its own motion."

Since any Section 5 proceeding directed to the take or pay provisions in appellant's contracts with Republic would involve simply that provision and would not require a review of an entire rate structure, there is no reason to suppose that the proceeding would involve any substantial delay.

[25] In this rule-making proceeding (F.P.C. Dkt. R-199) the Federal Power Commission has proposed to amend its Statement of General Policy by adding provisions stating that certain kinds of take or pay provisions in contracts for the transportation or sale of natural gas shall be inoperative and of no effect at law. The Kansas Corporation Commission has filed comments objecting to the adoption of the general rule proposed on the ground that it might impair the power of the states to regulate production, conserve natural resources and protect correlative rights. The comments do not, however, question the authority of the Federal Power Commission to modify or to eliminate take or pay provisions from a specific gas purchase contract on the basis of a record showing that in the particular case the modification or elimination is in the public interest.

In short, the position heretofore taken by the Federal Power Commission as to its authority necessarily leads to the conclusion that if the Kansas ratable take orders are deemed to produce consequences which cause the continuation of take or pay provisions in appellant's contracts to be not in the public interest, the Federal Power Commission has ample authority to deal with those consequences without impairing the effectiveness of the state orders. There is therefore no need to invalidate the state orders and thus disregard the legitimate state interest which they serve in order to vindicate any federal interest that may exist in the premises. On the contrary, a decision upholding the validity of the Kansas orders will at the same time leave unimpaired the Federal Power Commission's authority to deal with the alleged consequences that are said to be inconsistent with the Natural Gas Act and will thus implement the "comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority," which this Court has said it was the purpose of the Congress to create. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 520. Indeed since the Commission has, on its own view, plenary authority to deal with the only potential consequences of the Kansas orders that cause it to challenge them, there is even less basis for invalidating the orders than there would be for striking down the kind of state conservation measures, involving well spacing and the like, that appellant concedes to be valid. (Appellant's Brief, p. 19)

Appellant and the Commission both urge that the motive of the Kansas Commission in issuing the orders here in issue was "to exert leverage upon inter-

state pipeline companies to increase their takes from Kansas wells." (F.P.C. Memorandum, pp. 18-19) Three points may be made as to this line of argument.

First, the argument is based upon inferences essentially derived not from the orders here at issue, or from the proceedings in which they were entered, but rather from entirely different and separate proceedings before the Kansas Corporation Commission. In those proceedings, in determining allowables for the Kansas Hugoton Field, the Commission decided that it would make its own independent determination of market demand and appropriate total allowables and would not be bound by the nominations made by appellant and other takers of gas. The validity of this action of the Kansas Commission in fixing allowables is not involved in this case but is at issue in cases now pending before the Kansas Supreme Court.[26] The record on which the Commission acted in taking that action is not before this Court. It is assumed that this Court will not seek to determine the motives of the Kansas Commission in taking the action in the absence of that record and in advance of any determination of the questions involved by the Kansas court.

Second, these speculations as to motive are in any case irrelevant because it is well settled that if a state regulatory agency exercises power that is otherwise within its competence—here the power to require ratable taking and protect correlative rights—the exercise cannot be attacked on grounds of motive or on the

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[26] *Colorado Interstate Gas Co.* v. *State Corporation Commission*, Case Nos. 41515, 41516, 41555, 41556; *Southwestern Kansas Royalty Owners Association* v. *State Corporation Commission*, Case No. 42038; *Colorado Interstate Gas Co.* v. *State Corporation Commission*, Case No. 42185; *Northern Natural Gas Co.* v. *State Corporation Commission*, Case Nos. 42175, 42176 and 42230.

ground that it was in part designed to further purposes which, considered alone, the state has no constitutional power to effect. *Stephenson* v. *Binford*, 287 U.S. 251, 276; *Amy* v. *Watertown*, 130 U.S. 301, 319; *Soon Hing* v. *Crowley*, 113 U.S. 703.

And finally, as we have shown, the Federal Power Commission's own position is that it has ample authority to prevent any consequences that the state orders might otherwise have in "exert[ing] leverage upon interstate pipeline companies to increase their takes from Kansas wells." It is hardly in any position to argue, therefore, that the orders should be invalidated —and appellant thus permitted to ignore the correlative rights of Kansas landowners and producers—on the ground that the alleged "leverage" was one of the hoped-for results of the orders.

The attack on the validity of the Kansas orders discussed in this section of our brief rests entirely upon the assumption that appellant's obligations under the take or pay provisions of the Republic A contract are not, as a matter of contract law, superseded or modified by the orders.[27] Appellant itself, however, asserts that this assumption is incorrect and contends that the orders if valid modify its contractual obligations.[28] If

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[27] The Federal Power Commission expressly concedes that if the take or pay provisions in appellant's Republic A contract are superseded or modified by the Kansas orders those orders would not be invalid under the Natural Gas Act. (F.P.C. Memorandum, pp. 20, 21-22)

[28] Thus appellant states in its brief (page 29) "• • • • it is Northern's position that in the event the challenged regulations should herein be determined to be valid, necessarily the contract obligations would have to yield thereto • • •". See also appellant's statement in the Supplement to Application in F.P.C. Dkt. CP62-85, printed as Appendix G to the Memorandum of the

this Court should be of the view that the validity of the Kansas orders depends upon whether they supersede or modify appellant's contractual obligations then we concur in the suggestion of the Federal Power Commission that the case should be remanded to the Supreme Court of Kansas for decision of that antecedent question of state law.

We submit, however, that this would not be a proper disposition of this case and that there is no need for any remand. As we have shown above the validity of the Kansas orders is not controlled by appellant's private contract obligations, and the orders are equally valid whether or not they are assumed to supersede or modify those obligations.

CONCLUSION

For the foregoing reasons, the judgments below should be affirmed.

Respectfully submitted,

CHARLES C. McCARTER
State Corporation Commission
State Office Building
Topeka, Kansas

HUGH B. COX
HENRY P. SAILER
Union Trust Building
Washington 5, D. C.

Attorneys for Appellee

November 19, 1962

Federal Power Commission, that "It is Northern's • • • position that the 'ratable take' orders issued by the Kansas Corporation Commission limit the volume of gas Northern may lawfully purchase from the wells under this Contract to such wells' ratable share of Northern's actual market requirements from this Field." (F.P.C. Memorandum, p. 67)

APPENDIX A

Statutes Involved

KANSAS G.S. 1961 Supp. 55-703 provides:

"Production regulations; rules and formulas. Whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof. The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of any one common source of supply as against another and in favor of or against any producer in any such common source of supply. In promulgating rules, regulations and formulas, to attain such results the commission shall give equitable consideration to acreage, pressure, open flow, porosity, permeability and thickness of pay, and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time, as may be pertinent: Provided, however, That the daily takes of gas from any well in an unprorated gas pool shall not exceed twenty-

five percent (25%) of its open flow: Provided further, however, That the provisions of this act shall not apply to any common source of supply in which the average open flow of all the producing wells therein is not in excess of seven hundred fifty thousand (750,000) cubic feet per day. The commission in determining the market demand for gas from a common source of supply shall consider the reasonable current requirements for current consumption and use within and without the state, and such other factors, conditions, or circumstances that would aid in establishing the market demand."

KANSAS G.S. 1949, 55-704 provides:

"Rules and regulations authorized; notice and hearings. The commission shall promulgate such rules and regulations as may be necessary for the prevention of waste as defined by this act, the protection of all water, oil or gas-bearing strata encountered in any well drilled in such common source of supply, ascertaining the several factors entering into the determination of the productive capacity of each well, the total productive capacity of all wells in the common source of supply, the establishment of such other standard or standards as the commission may find proper to determine the productive capacity of each well and of all wells in such common source of supply, and as the commission may find necessary and proper to carry out the spirit and purpose of this act: Provided, however, That notice, as provided in section 8 [55-706] of this act, shall be served upon or given to the producers and purchasers of natural gas and all other persons, firms or corporations interested, of any hearing or hearings which may be called for the purpose of establishing any facts upon which any proposed rule or regulation may be based."